the subject matter of the default notice (see p 3 at the last paragraph of the judgment) whereas in the present suit there is no dispute as to the amount stated in the notice as the defendants did not make it an issue as in the previous suit other than to assert that the notice is ineffective. As breaches of the loan agreement are continuing breaches, I am of the view that the plaintiffs are entitled to issue a new notice to the defendants by invoking cl 10 of the loan agreement. The said notice and letter of demand had sufficiently complied with cl 10 of the loan agreement. This ground too fails.

Interest

The defendants contended that the interest claimed by the plaintiffs calculated to 31 December 1987 is without basis (see para 18 of the affidavit of Ricky Kho Teck Hock at encl 14). Paragraph 18 of the affidavit of Ricky Kho does not condescend into particulars as to how or why the interest claim is without any basis and it contains no more than a bare denial. It is one of the established principles in an application under O 14 that the affidavit showing cause must condescend upon particulars. Therefore there is no merit on this ground.

In my view this is a clear and straightforward case of a loan agreement whereby the full loan was advanced to the defendants by the plaintiffs and the defendants have not kept to paying the loans as agreed in the said agreement and the plaintiffs have taken the necessary steps in accordance with the provisions of the said agreement before filing the present suit. I am satisfied that there are no triable issues in this case though the defendants seemed to try to impress upon the court that the issues are complex and involved. Raja Azlan Shah J (as he then was) in *Esso Standard Malayan Berhad* v *Southern Cross Airways (M) Bhd*[2] at p 171 said:

> It is I think right that an order under RSC O 14 should be made only if the court thinks it is a plain case and ought not to go for trial. If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

The above-quoted passage aptly fits into the present case and I would accordingly allow the application of the plaintiffs with costs. In view of my judgment of the plaintiffs' application, the application of the defendants under O 18 r 19 of the RHC must necessarily fail and the said application of the defendants is accordingly dismissed with costs.

Plaintiffs' application allowed.

Solicitors: *Anthony Liew; Chew, Jugah, Wan Ullok, Goh & Co.*

Reported by *Yap Shao Sin*

Liew Yin Yin Construction Sdn Bhd v Yata Enterprise Sdn Bhd

HIGH COURT (IPOH) - WINDING UP NO 42-33-88
PEH SWEE CHIN J
21 APRIL 1989

Civil Procedure - Winding-up petition against company - Application by motion for, inter alia, stay of proceedings or striking out of petition made by company - Notice of intention to appear on petition filed - Whether motion and notice constitute fresh steps after appearance - Rules of the High Court 1980, O 13 r 1

Companies and Corporations - Winding-up petition against company - Alleged inability to pay debts - Arbitration clause in contract between parties - Dispute as regards amount owing - Admitted amount not paid - Breach of contract alleged against petitioner - Whether petition should be stood over or struck out

The petitioner commenced winding-up proceedings against a company alleging that the company was unable to pay its debts. The company applied by motion for an order that the hearing of the petition be stayed, alternatively that it be struck out or dismissed on the ground that the disputes between the parties ought to be referred to arbitration pursuant to an arbitration clause in the contract between them. The company said that the matters in dispute were as regards the amount of money as claimed by the petitioner and the breach of contract allegedly committed by the petitioner. The petitioner claimed the sum of $478,440.49 but the company alleged that the sum owing was only $129,912.30.

The solicitors for the company had filed a 'notice of intention to appear on petition' and later filed the motion. It was submitted for the petitioner that the company had taken a step after appearance and that the very motion was such a step. It was also submitted that the notice was also such a step.

Held, striking out the petition:

(1) In view of the intended arbitration proceedings and the alleged breach of contract, the non-payment of the admitted sum of $129,912.30 was quite excusable.

(2) The argument that the motion was a further step after appearance was plainly unacceptable for the motion was the only conceivable way to compel the petitioner to observe the arbitration agreement.

(3) The argument that the notice was a step after appearance was also plainly unacceptable. A notice of intention to appear is in effect an appearance.

(4) The disputes ought to be referred to arbitration as agreed, without further ado. For the court to inquire into the disputes would amount to the court adjudicating on the disputes, thereby frustrating the very arbitration agreement which a court should normally act on.

(5) The disputes left the court speculating as to which sum was the correct sum and as to whether there was a breach of contract as alleged. The disputed allegations were ignored by the court with the result that the petitioner had failed to prove that the company was unable to pay its debts and in the circumstances it was also not just and equitable that the company be wound up. The court found that the disputes were bona fide in the circumstances.

(6) On the ground that for the matters of dispute the parties ought to be held to their original arbitration agreement, it would

be unjust to stand over the petition until the arbitration proceedings were completed. The petition would also be struck out on the ground that the companies court should not be used to resolve disputes between the parties and that viva voce evidence would be required to resolve them.

Cases referred to

1 *Willesford* v *Watson* [1873] LR 8 Ch 473 (folld)
2 *Re Lympne Investments Ltd* [1972] 2 All ER 385 (folld)
3 *Jurupakat Sdn Bhd* v *Kumpulan Good Earth Sdn Bhd* [1988] 3 MLJ 49 (refd)
4 *Tay Bok Choon* v *Tahansan Sdn Bhd* [1987] 1 CLJ 441 (folld)

Legislation referred to

Rules of the High Court 1980, O 13 r 1

Ong Ban Chai (*Chang Kok Keong* with him) for the petitioner.
Philip Loh Yin Fah for the respondent.

Cur Adv Vult

Peh Swee Chin J: This creditor's petition came up for hearing together with a notice of motion (encl 5) by the respondent company asking for an order, inter alia, that the hearing of the petition be stayed or alternatively that it be struck out or dismissed.

The motion from the respondent was founded on the ground that the disputes between the parties hereto ought to be referred to arbitration in pursuance of an arbitration clause contained in a contract made between the petitioning creditor of the one part and the respondent of the other, the matters in dispute being the respondent's denial of the amount as claimed by the petitioning creditor and the breach of contract committed allegedly by the petitioning creditor for wrongfully suspending or stopping the contract work.

The arbitration clause in this contract in question was as follows:

> 22 In the event of any dispute of difference between the contractor and the sub-contractor, whether arising during the execution or after the completion or abandonment of the sub-contract works or after the determination of the employment of the sub-contractor under this sub-contract (whether by breach or in any other manner), in regard to any matter or thing of whatsoever nature arising out of this sub-contract or in connection therewith, then either party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration of such person as the parties hereto agree to appoint as arbitrator or failing such agreement as may be appointed on the request of either party be the president for the time being of the Pertubuhan Akitek Malaysia.
>
> Appointment of such arbitrator by the President of the Pertubuhan Akitek Malaysia shall by virtue of this agreement be deemed to be made with the agreement and consent of the parties to the sub-contract.
>
> Whether the appointment of such arbitrator is by agreement between the parties or by the president of Pertubuhan Akitek Malaysia his award shall be final and binding on both parties.
>
> Upon appointment the arbitrator shall, with despatch, initiate the arbitration proceedings following the provisions of the Arbitration Act 1952 (Rev 1972). The hearing may be 'ex parte' should either party, having been given due notice, fail to attend.
>
> Provided that such arbitrator shall not without the written consent of the architect or the contractor and in any case of the sub-contractor enter on the arbitration until after the completion or abandonment of the main contract works, except to arbitrate upon the question whether or not a certificate has been improperly withheld or is not in accordance with the terms of the main contract.
>
> And provided further that in any such arbitration as is provided for in this clause any decision of the architect which is final and binding on the contractor under the main contract shall also be deemed to be final and binding between and upon the contractor and the sub-contractor.

It would be interesting to observe at this juncture that to seek to recover the alleged debt owing by the respondent, the petitioning creditor had jumped two guns instead of one if I may be pardoned for the expression. He had eschewed the arbitration proceedings by resorting to the court; further, instead of claiming and proving the alleged debt viva voce in an ordinary court, he had resorted further to a companies court, a companies court primarily dealing with affidavit evidence and the winding-up of companies. The question was, was the petitioning creditor entitled to do so?

I had no hesitation in holding that disputes had arisen between the parties. The petitioning creditor claimed a sum of $478,440.49 but the respondent disputed the sum and alleged that a previous sum of $779,228.48 had already been paid to the petitioning creditor in respect of progress payment certificates No 1 to 5, and that the sum due would be only $129,912.30 as evidenced by a certain letter. Please see paras 5 and 6 of the affidavit of Teh Keng Bean (encl 4). This was challenged by the petitioning creditor exhibiting a rather sketchy document said to be a summary of the alleged accounts between the parties, unaudited and unsupported by receipts and vouchers. A further dispute arose in connection with the alleged wrongful termination of work or alleged breach of contract, between the parties. A breach of contract would always entitle an innocent party to damages without even proof of any special damage, as a violation of a right is always involved.

In view of the intended arbitration proceedings and the alleged breach of contract, the non-payment of the respondent's figure of $129,912.30 was quite excusable.

In my view, the arbitration agreement or clause was a valid one but it was urged on this court by the petitioning creditor that the respondent had taken a step in the proceedings after appearance. The petition was filed on 23 June 1988 and solicitors for the respondent filed a 'notice of intention to appear on petition' on 12 August 1988 and this was followed by the present motion to stay proceed-

ings or to strike out the same, the latter having been filed on 13 September 1988.

It was submitted by the petitioning creditor that the very motion (encl 5) asking for stay or striking-out was such a further step after appearance. This argument was plainly unacceptable, for this motion was the only conceivable way to compel the petitioning creditor to observe the arbitration agreement. It was further argued that the said notice of intention to appear was also such a step, after appearance. This was again plainly unsustainable. A notice of intention to appear is in effect an appearance and vice versa, thus, eg under one of the Rules of High Court a plaintiff may enter judgment for a liquidated demand 'if the defendant fails to enter an appearance', vide O 13 r 1. Please compare our O 13 r 1 with the O 13 r 1 of the UK Rules of the Supreme Court 1965, where a plaintiff may enter final judgment similarly 'if the defendant fails to give notice of intention to defend'. This would appear to lend some somewhat superfluous weight to what is in fact a truism that a notice of intention to appear or to defend is equivalent to entering an appearance. Short of admission of liability, the disputes, in my view, referred to above ought to be referred to arbitration as agreed, without further ado. For the court to enquire into the disputes would amount to the court adjudicating on the disputes, thereby frustrating the very arbitration agreement which a court should normally act on, per Lord Selborne LC in *Willesford* v *Watson*[1] at p 480.

For the sake of an academic exercise, assuming that there was no dispute at all between the parties, and that either the notice of intention to appear or the present motion was a step taken after appearance, and that parties be freed from the arbitration agreement, then, it would then have to be considered if the companies court had been properly used to entertain the claim of the petitioning creditor. I will now deal with this.

In the oft-quoted modern landmark case of *In Re Lympne Investments Ltd*,[2] in dismissing a winding-up petition, Meggary J said:

> It therefore seems to me that this petition must fail. A real dispute, turning to a substantial extent on disputed questions of fact which require viva voce evidence, and involving charges of fraud or near fraud, cannot properly be decided on petition. Nor is it right, or in accordance with the modern practice, to stand over the petition in order that the disputed issues may be resolved in other proceedings. That practice, I may say, seems to stem from *Re London and Paris Banking Corpn* [(1875) LR 19 Eq 444]. The companies court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out.

In Re Lympne Investments Ltd[2] was followed and relied on by a number of Malaysian cases, the last one of which, if I am not mistaken, was *Jurupakat Sdn Bhd* v *Kumpulan Good Earth Sdn Bhd*.[3]

Here the disputes left the court speculating as to which sum was the correct figure and as to whether there was a breach of contract as alleged. Here neither side applied to cross-examine the deponents. Lord Templeman in *Tay Bok Choon* v *Tahanson Sdn Bhd*[4] at p 444 had this to say:

> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioners, and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence of cross-examination, the judge must ignore the disputed allegations.

The disputed allegations in the instant case were so ignored by the court, with the result that the petitioning creditor had failed to prove that the respondent was unable to pay its debts and in the circumstances, it was also not just and equitable that the respondent be wound up.

The same observations above would apply equally to the dispute, ie the respondent's breach of contract by wrongful suspension of work for which the respondent presumably would claim damages.

In the circumstances, on the assumed position that the parties should not be held to their arbitration agreement, then the court found the disputes to be anything but not bona fide in the circumstances set out above.

On the ground that for the matters of disputes the parties ought to be held to their original arbitration agreement, it would be unjust to stand over the petition herein until the arbitration proceedings were completed. The court therefore allowed the motion of the respondent by striking out the petition which was therefore dismissed with costs.

In any event, the court would have made the same order in terms stated above, on the ground that a companies court should not be used to resolve disputes between the parties hereto and that viva voce evidence would be required to resolve them.

Application allowed.

Solicitors: *Chan & Associates*; *Philip Loh Associates*.